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IN THE

Supreme Court of the United States

October Term, 1965

No. 88

In the Matter of Disciplinary Proceedings Against
NEIL S. MACKAY, an Attorney at Law,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the State of Alaska.

AMICUS CURIAE BRIEF OF ALASKA BAR ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA AND IN SUPPORT OF PETITION FOR REHEARING

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The Alaska Bar Association presents its amicus curiae brief in support of the petition for Writ of Certiorari and in support of petition for rehearing of this Court's order dated June 20, 1966 denying the petition for a Writ of Certiorari to the Supreme Court of the State of Alaska, and, in support thereof, respectfully shows:

Grounds For Rehearing

The Alaska Bar Association was created as an agency of the Territorial government in 1955. Patterned closely after the Washington State Bar Association, the hallmark and proudest privilege of the Alaska Bar Association has been the rights and obligations of self-government and self discipline granted by the statute which created the association. In 1959, the Alaska Bar Associa-

tion became an agency of the government of the new state (A.S. 08.08.010). The organized bar of Alaska is enshrined in the Constitution of Alaska (Art. IV, Sec. 8), which bestows important duties upon the Alaska Bar Association in connection with the selection of judges under the Alaska version of the Missouri plan.

On June 1, 1964, the Justices of the Supreme Court of Alaska attempted by court order and rule to abolish the Alaska Bar Association as a statutory agency of the state government and to substitute in its place a "reintegrated" state bar founded upon court rule and subject entirely to control by the members of the Alaska Supreme Court.

Many features of the proposed court-integrated State Bar Association were repugnant to the lawyers of Alaska — none more so than a provision in the new court rules to the effect that a dismissal by the Board of Governors of the Alaska Bar Association of charges of misconduct tried by the Association would not be effective, but would in all cases be subject to redetermination by the members of the Court. To the lawyers of Alaska this was an unsatisfactory substitute for the privilege of self-government bestowed upon the integrated bar by the Alaska legislature, as in Washington and California.

An impasse was reached when officials of the statutory Bar Association respectfully declined to serve in the new association projected by the members of the Court. The upshot was that ex parte orders were issued by the three members of the Court, directing the State Police to seize the assets of the statutory Bar Association and purporting to remove the officers and Board of Governors from office. The Alaska Bar Association and its members responded by filing an action in the United States District

Court for the District of Alaska at Anchorage, seeking to vindicate numerous federal constitutional rights which the members of the Alaska Bar Association believed had been violated by the Justices.

The members of the Court resurrected in 1964 a disciplinary complaint against petitioner Neil S. Mackay, of which he had been duly acquitted by the Board of Governors of the Alaska Bar Association in accordance with A.S. 08.08.220 in December, 1961. The members of the Court used the Mackay case for the purpose of making declarations of state law for the guidance of the three Judges of the United States District Court before whom the Justices were themselves cast in the role of defendants. The District Court formally ruled that it had jurisdiction. The District Court also plainly indicated at the trial of the Bar Association's case that the Association's federal constitutional rights would, if necessary, be protected by the judgment of the Court. Whereupon, the Justices abandoned their attempt to take over the Alaska Bar Association, totally withdrew the rules which the Court had promulgated, granted recognition to the statutory bar association, vacated all orders aimed at the Association and its officers, and joined with the Alaska Bar Association in adopting revised rules of admission and discipline, which rules specifically preserved the profession's right of self-discipline. By the new rules the members of the Court agreed not to review disciplinary cases in which charges had been considered and dismissed by the Board of Governors.

In their haste to declare as the law of Alaska that which would bolster their position as defendants in the United States District Court, the Justices proceeded against petitioner Mackay without the benefit of a certi-

fied record of the proceedings had in 1961, and without the exhibits which pertained to those proceedings. Instead, acting entirely on hearsay, and without affording petitioner Mackay the right to be confronted by any witnesses, the Justices declared petitioner guilty of "cheating" a client, and pronounced disbarment upon him. In the Matter of Disciplinary Proceedings Against Neil S. Mackay, 416 P.2d 823 (1964).

Petitioner Mackay is the only lawyer in our brief history to be disciplined by the Justices on charges dismissed by the Board of Governors, nor do the members of the Court maintain that there was any irregularity in the proceedings before the Bar Association. The statute under which petitioner was tried by the Association provides that a dismissal by the Board of Governors is final. The same result obtains under court rules agreed to by the members of the Court at Juneau in December 1964, and subsequently ratified by the Alaska Bar Association and adopted by the members of the Court. The rules under which the Justices agreed not to review dismissals by the Board of Governors were agreed to and adopted while the resurrected Mackay case was pending before the members of the Court.

The result is that Mackay has been deprived of the equal protection both of the statute under which he was acquitted and the court rules under which his acquittal was not subject to review by the members of the Court. Of the nearly 250 members of the Alaska Bar Association, petitioner is the only one ever to be afforded such treatment.

There is no hint of any irregularity in the proceedings which resulted in petitioner's acquittal. Accordingly, petitioner's right to the equal protection of the Alaska

statute and court rules would prevent the resurrection of stale and unfounded charges, ancillary to unrelated litigation in the United States District Court, in which petitioner and the Justices of the Supreme Court of Alaska happened to be plaintiff and defendants, respectively.

Mackay's alleged misconduct related to a personal real estate transaction with a sometime client, and had no connection whatever with proceedings before any court. Thus the alleged misconduct in no way related to the business or work of the Supreme Court of Alaska, and was on the contrary squarely within the ambit of complaints entrusted to the tribunals of the organized bar by the statutes and court rules of Alaska, Washington, and California, as indeed the parties were personally advised by the Chief Justice of Washington, who traveled to Juneau in December 1964 to help the Alaska bench and bar with their problem.

Assuming that petitioner's right to equal protection of the laws did not prevent the resurrection of a charge of which he had been acquitted, then we urge that the Due Process Clause of the Fourteenth Amendment required that in the absence of any proper or certified record of the 1961 proceedings, petitioner should have been afforded a hearing and the right to be confronted by and cross-examine any witness against him.

The very existence of the Mackay case, as well as the unprecedented circumstances under which it arose, leaves every lawyer practicing in Alaska at the present time under a cloud of fear and doubt concerning the power of the members of the Supreme Court of Alaska to set upon lawyers without notice or hearing, in disregard of statutes and court rules, and in violation of

their rights to due process and equal protection which we claim under the Constitution of the United States. The very existence of the Alaska Bar Association as an independent bar association is threatened by what happened to petitioner in this case.

Conclusion

Therefore, the Alaska Bar Association urges this Court to grant the petitions for a Writ of Certiorari to the Supreme Court of the State of Alaska.

Respectfully submitted.

Signed.....

GEORGE FRANK BONEY
Attorney for Alaska
Bar Association

Certificate of Counsel

I, G. F. BONEY, counsel for the Alaska Bar Association, Amicus Curiae, do hereby certify that the foregoing brief in support of petition for Writ of Certiorari and petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified above.

Signed.....

GEORGE FRANK BONEY
Attorney for Alaska
Bar Association,
Amicus Curiae